

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2004-005523-001 DT

06/13/2016

HON. SHERRY K. STEPHENS

CLERK OF THE COURT  
K. Shafer  
Deputy

STATE OF ARIZONA

RYAN PATRICK GREEN

v.

JOSHUA IDLEFONSO VILLALOBOS (001)

LAWRENCE S MATTHEW  
TERRY LYNN LOVETT BUBLIK

CAPITAL CASE MANAGER

RULING

The Court has considered the defendant's Motion for *Enmund/Tison* Death-Eligibility Determination by Jury, filed March 10, 2016, the State's Response to Defendant's Motion for *Enmund/Tison* Death Eligibility Determination by Jury filed May 2, 2016, and the defendant's Reply to State's Response to Defendant's Motion for *Enmund/Tison* Death-Eligibility Determination by Jury filed May 26, 2016. At the status conference held on June 6, 2016, the parties agreed oral argument was unnecessary and the Court could rule on the pleadings submitted.

This case is before the court for a new penalty phase as a result of the parties' stipulation during post-conviction relief proceedings. Defendant argues that in addition to this new penalty phase, he also is constitutionally and statutorily entitled to have a jury make the *Enmund/Tison* finding.<sup>1</sup>

Defendant was charged with felony murder and child abuse involving the death of his girlfriend's five-year-old child. His statements to police were admitted at trial. During the

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<sup>1</sup> A defendant cannot be sentenced to death for felony murder unless he personally killed, attempted to kill, or intended that lethal force be employed, *Enmund v. Florida*, 458 U.S. 782, 798 (1982), or was a major participant in the underlying felony and acted with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987).

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interview, he admitted that he was alone with the child when he had grabbed her by the arm and hit her several times with a closed fist. At the guilt phase, the trial judge instructed the jury that the elements of felony murder and child abuse were as follows:

“The crime of first degree felony murder requires proof that: The defendant committed or attempted to commit child abuse and in the course and in furtherance of the offense of child abuse caused the death of Ashley Molina.”

“The crime of child abuse requires proof that the defendant, under circumstances likely to produce death or serious physical injury, intentionally or knowingly caused Ashley Molina to suffer physical injury.”

Thus, the jury was not instructed that it could find guilt based on an accomplice liability theory; by its guilty verdicts, the jury necessarily found that Defendant acted alone in causing the injuries that led to the child’s death.<sup>2</sup> See *State v. Dann*, 220 Ariz. 351, ¶¶71-75, 207 P.3d 604 (2009)(*Enmund/Tison* finding is not required for a defendant who is convicted under a felony murder theory and who, acting alone, actually killed). Following the jury’s guilty verdicts, Defendant did not request that the jury determine the *Enmund/Tison* finding either before or during the aggravation phase. On appeal, the Arizona Supreme Court noted that Defendant did not raise the *Enmund/Tison* finding as an issue on appeal and further stated that “[i]n any event, the evidence below overwhelmingly established that Villalobos was the actual killer.” *State v. Villalobos*, 225 Ariz. 74, 83 n.5, 235 P.3d 227, 236 n.5 (2010).

Defendant did not raise in the Rule 32 post-conviction proceedings any claim regarding the *Enmund/Tison* finding. In rejecting Defendant’s Rule 32 claims regarding the guilt phase, the PCR court found:

The Court finds that a second pathologist would not have refuted certain key trial evidence: that defendant was alone in the apartment with the two children during the early evening hours; that during that time the defendant struck the victim with a closed fist; that the blow caused a shortness of breath; that the child refused to eat at dinner time, and later appeared somewhat lethargic, to the extent that defendant attempted to confirm that she was still breathing; that the child vomited on defendant and that he mis-attributed the resulting odor to himself when questioned by the child’s mother; that an abdominal injury could have contributed to, or resulted in, the child’s death; and that defendant either initiated – or

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<sup>2</sup> The child’s mother, Linda Verdugo, was initially also charged with second-degree murder in the child’s death, but the State dismissed that count, leaving her charged with only child abuse under the theory that she failed to protect the child. She subsequently pled guilty to attempted child abuse and testified for the State at Defendant’s trial.

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continued – a chain of events that culminated in the child's death. Even with a defense pathologist's testimony, the guilty verdict would not change.

PCR Ruling, minute entry dated 12/17/14, at 22.

The Court finds that based on the Arizona Supreme Court's opinion, the court's recitation of the evidence adduced at the guilt phase as stated in the minute entry ruling on the post-conviction petition, and the prior trial jury's verdict, the *Enmund/Tison* finding has been satisfied and no further finding is required.

The Court further rejects the defendant's assertion that the *Enmund/Tison* finding is constitutionally required. This argument is based on the faulty premise that the *Enmund/Tison* finding is functionally the same as the finding regarding an aggravating circumstance. The Arizona Supreme Court rejected this contention in *State v. Ring (Ring III)*, 204 Ariz. 534, 65 P.3d 915 (2003). In *Ring III*, the defendants argued that because in *Ring v. Arizona (Ring II)*, 536 U.S. 584 (2002), the United States Supreme Court held that the Sixth Amendment required that aggravating circumstances making a defendant eligible for the death penalty must be found by a jury, so must the *Enmund/Tison* finding be made by a jury. The Arizona Supreme Court held that the two findings were conceptually and constitutionally distinct:

The difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury. *Id.* The Sixth Amendment assigns to the jury responsibility for determining whether all statutory criminal elements exist. Therefore, a defendant cannot receive a particular sentence unless a jury finds all the elements of the offense charged. *Id.* at 384, 106 S.Ct. at 696 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)). The *Enmund-Tison* findings, on the other hand, operate as a judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed. These two rules of law are conceptually and constitutionally distinct. We hold that the Sixth Amendment does not require that a jury, rather than a judge, make *Enmund-Tison* findings.

*Ring III*, 204 Ariz. at 564-565 ¶101.

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Because the *Enmund/Tison* finding is not the functional equivalent of an aggravating circumstance, neither the United States Constitution nor the Arizona Constitution requires that a jury determine the *Enmund/Tison* finding.<sup>3</sup>

For all of these reason,

IT IS ORDERED denying Defendant's Motion for *Edmund/Tison* Death-Eligibility Determination by Jury.

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<sup>3</sup> The Court recognizes that the trier of fact is required to make the *Enmund/Tison* finding pursuant to A.R.S. §13-752(P). However, for the reasons stated above, the Court finds that this statutory requirement was met by the first jury's verdict of guilty as to felony murder.